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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

STACI BURK,)	No. 2:22-cv-01967-DMF
)	
Plaintiff,)	
)	DEFENDANT MICHAEL T. FLYNN'S
v.)	REPLY IN SUPPORT OF HIS MOTION
)	TO DISMISS
KELLY TOWNSEND et al.,)	
)	
Defendants.)	

While Plaintiff is correct that she is not obligated to lay out every detail of her claims, she must still plausibly state a claim for relief. She has failed to do so, and her operative complaint must be dismissed.

ARGUMENT

I. Plaintiff fails to state any claim for relief.

Each cause of action against General Flynn depends on the conclusory assertion that he conspired with Defendant Townsend to send “agents” to terrorize Plaintiff in her home. *See* Dkt. No. 98 at ¶ 36. While General Flynn denies providing any assistance to Defendant Townsend related to Plaintiff, even if he had done so, there are no facts alleged to show that he intended to violate Plaintiff’s rights, that he acted under the color of law, or any of Plaintiff’s other myriad claims.

In her response, Plaintiff principally argues that this Court may find that there is some kind of agreement based on phone calls between General Flynn and Defendant Townsend. *See*

1 Dkt. No. 118 at 8–11. At best, however, Plaintiff’s allegations in the operative complaint claim
 2 that General Flynn spoke to Defendant Townsend about investigating the 2020 election, plans
 3 to solicit sworn testimony from witnesses, and “status updates” about unspecified “activity” of
 4 unspecified “Defendants’ [plural] Agents.” Dkt. No. 98 at ¶ 61. Nothing about this rises to the
 5 level of plausibly alleging the conspiracy or agreements asserted by Plaintiff.

6 Moreover, even if she could revive the prior version of her allegations about these phone
 7 calls from her Second Amended Complaint, which are entirely superseded by the operative
 8 complaint, those allegations fare no better. *See Harris v. City of Kent*, No. 22-35346, 2023 WL
 9 6784361, at *3 (9th Cir. Oct. 13, 2023) (citing *Ramirez v. Cnty. of San Bernardino*, 806 F.3d 1002,
 10 1008 (9th Cir. 2015) (explaining that an amended complaint supersedes the original).

11 Plaintiff previously alleged that Defendant Townsend and General Flynn discussed plans
 12 for a public hearing on election fraud, and “plans to switch out [Plaintiff’s] security team.” Dkt.
 13 No. 38 at ¶¶ 165. Again, nothing about this plausibly alleges a conspiracy, agreement, or meeting
 14 of the minds to torment or hold Plaintiff against her will.¹ This is particularly so, as Plaintiff
 15 acknowledges that she initially agreed to accept security. Dkt. No. 118 at 15 (“[Plaintiff] had
 16 briefly agreed to allow security”).

17 As cited by Plaintiff in her opposition brief, “each participant [in a conspiracy] must at
 18 least share the common objective of the conspiracy.” Dkt. No. 118 (quoting *United Steelworkers of*
 19 *Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th Cir. 1989)). In this case, the “objective” alleged
 20 by Plaintiff was “investigating election fraud claims.” Dkt. No. 98 at ¶¶ 54, 62. Plaintiff may have
 21 alleged a relationship between General Flynn and Defendant Townsend regarding their shared
 22 goal of investigating election fraud, but Plaintiff has alleged nothing to suggest any agreement by
 23 General Flynn to violate Plaintiff’s rights.

24
 25
 26
 27 ¹ It is noteworthy that this call allegedly took place on speakerphone, with Plaintiff able to hear
 28 both sides of the conversation. Plaintiff, therefore, cannot allege any inference to be drawn from
 an unheard side of the conversation. If General Flynn had agreed or conspired to violate
 Plaintiff’s rights on this phone call, she could have alleged such an agreement. She did not.

1 Plaintiff has had numerous bites at the apple, and this Court has given generous latitude
 2 for her to assert comprehensible, legal claims. The operative complaint is Plaintiff's second
 3 attempt at a third amended complaint, and it still fails to set out *facts*—as opposed to conclusory
 4 assertions of conspiracy—to show conduct of General Flynn that could subject him to liability.

5 Moreover, Plaintiff's opposition brief demonstrates that any further amendment would
 6 be a waste of time, as she repeatedly meanders back into the same type of non-sequiturs and
 7 confusing conspiracy theories that have plagued each iteration of her complaint. *See, e.g.*, Dkt.
 8 No. 118 at 9, 9 n.4, 13, 14–15, 17–18, 20, 22. She repeatedly refers to actions of unspecified
 9 “defendants,” plural, without specifying to whom she is referring. *See, e.g.*, Dkt. No. 118 at 19, 22,
 10 24. She repeatedly claims to have pleaded facts which appear nowhere in her complaints. *See, e.g.*
 11 Dkt. No. 118 at 10, 17. She attributes actions to General Flynn with citations to paragraphs that
 12 refer only to Defendant Townsend (or which otherwise bear no relation to the description in her
 13 opposition brief). *See, e.g.*, Dkt. No. 118 at 10, 17, 20 n.12, 23. Plaintiff does not and cannot show
 14 facts of an agreement by General Flynn to do anything other than investigate election fraud, and
 15 does not allege any actions of General Flynn that would subject him to liability.

16 Plaintiff therefore has failed to meet her burden of plausibly alleging a claim for relief
 17 against General Flynn. Her Third Amended Complaint should be dismissed with prejudice.

18 **a. Compliance with Local Rule 12(c).**

19 While Plaintiff complains that General Flynn did not meet and confer with her prior to
 20 filing the instant motion to dismiss, this ignores the Court's prior orders regarding her multiple
 21 deficient complaints, and the granting of extra time for General Flynn to file a motion to dismiss.
 22 *See* Dkt. Nos. 75 and 90. Not only should such a meet and confer not be required under these
 23 unique circumstances, but it would have been fruitless—as it would not have avoided motions
 24 practice—and this situation has nevertheless been cured.

25 On November 30, 2023, this Court raised concerns not only that Plaintiff failed to allege
 26 valid causes of action (including a valid federal claim “thereby depriving this Court of
 27 jurisdiction”), but also that “Plaintiff may be using this forum for improper purposes rather than
 28 to raise valid legal claims.” Dkt. No. 75 at 1–2. The Court indicated that it would allow an

1 amendment “perhaps for the last time” to file the operative complaint. *Id.* at 2. Undersigned
2 counsel met and conferred with Plaintiff, asking for an extension to file a motion to dismiss, and
3 this Court subsequently granted that request. Dkt. No. 90. Based on the deficiencies in the Third
4 Amended Complaint, the November 30 Order, and the general procedural posture of the case,
5 the meet and confer requirement seemed inapplicable.

6 Immediately following Plaintiff’s response in opposition, however, where she asserted the
7 desire for a meet and confer, undersigned counsel reached out to Plaintiff to schedule a Rule
8 12(c) meeting. After exchanging several emails with Plaintiff, and having fully evaluated Plaintiff’s
9 opposition brief, undersigned counsel spoke with Plaintiff on the phone about the deficiencies
10 of her Third Amended Complaint. Undersigned explained to Plaintiff that these legal deficiencies
11 were fatal, and that General Flynn would not consent to amendment, especially considering the
12 history of prior deficient complaints and that none of Plaintiff’s proposed amendments or
13 arguments would have remedied the deficiencies. Therefore, no agreement could be made as to
14 a cure for the deficits of the operative complaint, and none could have been reached had the
15 meeting taken place prior to filing General Flynn’s motion to dismiss.

16 This court previously determined that “striking a motion for failure to fulfill Local Rule
17 12.1(c)’s ‘meet and confer’ requirement is unnecessary ‘when the movant promptly takes active
18 steps to cure any harm caused by the failure.’” *Nees v. City of Phoenix*, No. CV-21-01134-PHX-
19 GMS, 2022 WL 110188, at *1 (D. Ariz. Jan. 12, 2022) (citing *Wine Educ. Council v. Ariz. Rangers*,
20 No. CV-19-02235-PHX-SMB, 2020 WL 7352632, at *8 (D. Ariz. Dec. 15, 2020)). Moreover, this
21 situation is far removed from a perfunctory compliance like that in *Cartessa Aesthetics LLC v.*
22 *Aesthetics Biomedical Inc.*, No. CV-19-05827-PHX-DWL, 2021 WL 778541, at *3 (D. Ariz. Mar. 1,
23 2021). In *Cartessa*, counsel merely mentioned the issues in passing during a Friday phone call and
24 then filed their motion to dismiss on the following Monday. *Id.*

25 Here, in contrast, counsel for General Flynn and Plaintiff each possessed a full outline of
26 the issues each side presented in their respective motion and response, and Plaintiff was on notice
27 of the defects of her pleadings from this Court’s prior Order and prior motions to dismiss filed
28 by other defendants. After full consideration, with plenty of time before this reply brief was due,

1 neither party was able to propose a mutually agreeable remedy to any of the deficiencies other
2 than judicial resolution. Given the procedural posture of this case, and the history of Plaintiff's
3 deficient complaints, no agreement would have been possible regardless.

4 **CONCLUSION**

5 For the foregoing reasons, General Flynn respectfully requests that this Court dismiss
6 Plaintiff's Third Amended Complaint, in its entirety, with prejudice.

7
8 DATED: March 25, 2024

9 /s/ Shawn Flynn

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18 **CERTIFICATE OF SERVICE**

19 I certify that on March 25, 2024, a copy of the foregoing was filed with the Clerk
20 of the Court using the Court's CM/ECF system, which will send a copy to all counsel of
21 record.
22

23
24 /s/ Shawn Flynn

25 Shawn M. Flynn

26 *Attorney for Michael T. Flynn*
27
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